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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 OLIVER CRISTOBAL,

13 Plaintiff,

14 vs.

15 EXPERIAN INFORMATION
16 SOLUTIONS, INC., et al.,

17 Defendants.
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Case No.: 3:16-cv-06328-RS

**DEFENDANT EQUIFAX, INC.'S
REPLY IN SUPPORT OF MOTION
TO DISMISS COMPLAINT**

Date: March 30, 2017

Time: 1:30 p.m.

Courtroom: 3, 17th Floor

The Honorable Richard Seeborg

I. INTRODUCTION

In his Opposition to Defendant Equifax, Inc.’s (“Equifax’s”) Motion to Dismiss (“Opp.”), Plaintiff argues that the information furnished by co-defendant Creditors Credit First, National Association (“Credit First”) and Barclay’s Bank Delaware (“Barclay’s”) and allegedly reported¹ on his credit report after the confirmation (not discharge) of his Chapter 13 bankruptcy plan was inaccurate and misleading. (Opp., p. 6.) Plaintiff would have this Court ignore the unanimous view of many courts, including decisions from six different judges in this District alone, that the historical derogatory reporting of an account during the pendency of a bankruptcy proceeding is not inaccurate under the FCRA. *See, e.g., Mortimer v. Bank of America, N.A.*, No. C-12-01959-JCS, 2013 WL 1501452, at *10 (N.D. Cal. Apr. 10, 2013). Since Equifax filed its Initial Motion, four more decisions in this District have reaffirmed that conclusion. *See Doster v. Experian Info. Sols., Inc.*, 2017 WL 264401, at *4-7 (N.D. Cal. Jan. 20, 2017); *Connors v. Experian Info Sols, Inc.*, 2017 WL 168493, at *4-5 (N.D. Cal. Jan. 17, 2017); *Keller v. Experian Info. Sols., Inc.*, 2017 WL 130285, at *8 (N.D. Cal. Jan. 13, 2017); *Devincenzi v. Experian Info. Sols., Inc.*, 2017 WL 86131, at *7 (N.D. Cal. Jan. 10, 2017). Plaintiff urges this Court not to follow *Mortimer* and its progeny and argues that the recent decisions dismissing the virtually identical Complaint got it wrong. But no authority supports Plaintiff’s efforts to use the FCRA to modify how debts subject to Chapter 13 proceedings are reported, and many courts have rejected his policy arguments. Plaintiff’s emphasis on the industry guidelines promulgated by the CDIA is misplaced and unavailing.

Plaintiff claims the confirmation order is “res judicata” as to the modified rights and liabilities of the debtor and his creditors – the parties to the plan.

¹ Plaintiff’s Opposition does not address Equifax’s argument that it is not a CRA as that term is defined by the FCRA and is therefore an improper party to this action.

1 Equifax is not capable, however, of resolving a legal dispute between Plaintiff and
 2 his creditors over how accounts should be reported during the pendency of his
 3 bankruptcy case, nor is Equifax obligated to do so under the FCRA. Because
 4 Plaintiff's entire suit is premised on the *legal impact* that the confirmation of his
 5 bankruptcy plan may have had on his various account obligations, Plaintiff cannot
 6 state a cause of action under the FCRA against Equifax.

7 And though Plaintiff notes that he alleged (apparently in the alternative) in
 8 his Complaint that Equifax did not send an Automated Consumer Dispute
 9 Verification ("ACDV") to the co-defendant furnishers, he also pleaded that Equifax
 10 *did* send the furnishers notification that Plaintiff was disputing the accuracy of what
 11 they were reporting to Equifax. (Compl., ¶¶ 109, 127.) Under Plaintiff's own
 12 Complaint, then, Equifax did comply with its obligations to notify Credit First and
 13 Barclay's of Plaintiff's dispute under the FCRA.

14 Moreover, Plaintiff fails to address Equifax's argument that Plaintiff does not
 15 adequately allege that Equifax acted either willfully or negligently, as required
 16 under the FCRA.

17 Permitting Plaintiff to amend his Complaint would be futile. For all the
 18 foregoing reasons and as set forth in Equifax's initial Motion, the Motion should be
 19 granted with prejudice.

20 II. ARGUMENT

21 A. Plaintiff Has Not Pled the Existence of an Actionable Inaccuracy.

22 While Plaintiff alleges that Equifax "failed to conduct a reasonable
 23 investigation" of his account information as required by the FCRA, he also alleges
 24 that each CRA sent each creditor notification that Plaintiff was disputing the
 25 accuracy of what it was reporting to them². (Compl., ¶¶ 109, 128, 135.) Thus,
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27 ² Plaintiff apparently alleges in the alternative that Equifax "failed to send an ACDV" to the Creditor Defendants.
 28 (Opp., p. 7.)

1 Equifax did comply – by Plaintiff’s own admission – with its statutory duty to
 2 notify the furnishers of Plaintiff’s dispute, and the Complaint should be dismissed
 3 for this reason alone.

4 Nevertheless, the law is clear that in order to state a prima facie claim under
 5 the FCRA for failure to perform a reasonable reinvestigation, Plaintiff must allege,
 6 among other elements, that an inaccuracy existed in his credit report. *Carvalho v.*
 7 *Equifax Info. Servs., LLC*, 629 F.3d 876, 890 (9th Cir. 2010) (holding that although
 8 the FCRA “does not on its face require that an actual inaccuracy exist for a plaintiff
 9 to state a claim, many courts, including our own, have imposed such a
 10 requirement”). Tellingly, Plaintiff does not allege, and does not argue in his
 11 Opposition, that Equifax was reporting the original contracts with Credit First and
 12 Barclay’s incorrectly, that he has paid these creditors in full, that he has obtained a
 13 discharge of the debts, or that he does not owe any amount to Credit First and
 14 Barclay’s. Instead, Plaintiff alleges that due to the confirmation (not discharge) of
 15 his bankruptcy plan, his original debt obligations were modified.

16 Six different judges in this District alone have concluded that there is nothing
 17 inaccurate or misleading about reporting information about delinquent accounts
 18 while a bankruptcy petition is pending and before a discharge order has been
 19 entered. *See, e.g., Doster*, 2017 WL 264401, at *4-7 (“[E]ven if Plaintiff is correct
 20 that Plaintiff’s credit report did not reflect the terms of Plaintiff’s Chapter 13
 21 bankruptcy plan, this would not be an inaccurate or misleading statement that could
 22 sustain a FCRA claim.”); *Connors*, 2017 WL 158493, at *4 (same).³

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 25 ³ *See also Keller*, 2017 WL 130285, at *8 (“[T]he Court rejects Plaintiff’s argument that his credit report was
 26 misleading or inaccurate for reporting delinquent debt during the pendency of his Chapter 13 bankruptcy.”);
 27 *Devincenzi*, 2017 WL 86131, at *7 (“The Court finds as a matter of law that reporting a delinquent debt during the
 28 pendency of a bankruptcy is not inaccurate or misleading, and thus these claims are dismissed with prejudice.”);
Jaras v. Experian Info. Solutions, Inc., 2016 WL 7337540, at *3 (N.D. Cal. Dec. 19, 2016); *Adkins v. Experian Info.*
Sols., Inc., 2016 WL 6841700, at *2-4 (N.D. Cal. Oct. 7, 2016); *Biggs v. Experian Info. Sols., Inc.*, ___ F. Supp. 3d ___,
 2016 WL 5235043, at *2-4 (N.D. Cal. Sept. 22, 2016); *Blakeney v. Experian Info. Sols., Inc.*, 2016 WL 4270244, at
 *5 (N.D. Cal. Aug. 15, 2016); *Mestayer v. Experian Info. Sols., Inc.*, 2016 WL 631980, at *3 (N.D. Cal. Feb. 17,

1 Plaintiff responds with two unconvincing arguments: (1) Plaintiff claims that
2 a Chapter 13 confirmation order modifies pre-existing debts and creates a new
3 contract, the terms of which must then be reported and; (2) Plaintiff claims that he
4 can maintain an FCRA claim based on alleged deviations from industry guidelines.

5 First, it is settled law in this district that a Chapter 13 confirmation order
6 does not alter a legal debt's status. Plaintiff's position has been repeatedly rejected
7 in this District. For example, in *Jaras*, the same lawyers that represent Plaintiff here
8 argued that "under the principle of *res judicata* a credit report is not accurate unless
9 it reflects the terms of the Chapter 13 plan." 2016 WL 7337540, at *4. In rejecting
10 this argument, Judge Koh observed that "even if a confirmation order constitutes a
11 final judgment, it constitutes a final judgment only as to the manner in which the
12 debtor will discharge his financial obligations, not the legal validity of the debt."
13 *Id.* (internal quotations marks omitted). Any "arguments based on *res judicata* are
14 unavailing because a confirmation order does not constitute a final determination of
15 the amount of the debt." *Id.*; see also *Keller*, 2017 WL 130285, at *6 ("As
16 discussed at length in *Jaras*, *Blakeney*, and other cases, the legal status of a debt
17 does not change until the debtor is discharged from bankruptcy. . . . Thus, a
18 confirmation order does not constitute a final determination of the amount of the
19 debt, and it is not misleading or inaccurate to report delinquent debt during the
20 pendency of a bankruptcy proceeding but before discharge."). Thus, as here, pre-
21 discharge, Equifax may continue to report historically accurate information about
22 Plaintiff's delinquent accounts without regard for the terms of the confirmed plan.

23 In his Opposition, Plaintiff conflates bankruptcy ideals with credit reporting,
24 and the cited cases are wholly irrelevant bankruptcy cases that do not involve claims
25 under the FCRA. The instant lawsuit does not present any reason to ignore the
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28 2016); *Giovanni v. Bank of Am., N.A.*, 2013 WL 1663335, at *5-6 (N.D. Cal. Apr. 17, 2013); *Mortimer*, 2013 WL 1501452, at *10; *Harrold v. Experian Info. Sols., Inc.*, 2012 WL 4097708, at *4 (N.D. Cal. Sept. 17, 2012).

1 settled case law that exists in this jurisdiction. Because Plaintiff cannot find any
 2 supporting case law, he makes policy arguments about how he believes debts should
 3 be reporting post-confirmation but this forum is not the place for such arguments.

4 Second, even taking Plaintiff's allegations about the supposed force of the
 5 CDIA guidelines and Metro 2 format as true, "[t]o the extent that the account was
 6 delinquent during the pendency of the bankruptcy, failure to comply with the CDIA
 7 guidelines does not render the report incorrect." *Mortimer v. Bank of America, N.A.*,
 8 2013 WL 1501452, at *12. *See also Doster v. Experian Info. Solns.*, 2017 WL
 9 264401, at *5 (N.D. Cal. Jan. 20, 2017) ("courts in this district have repeatedly held
 10 that accurately reporting a debt during the pendency of a bankruptcy is not rendered
 11 unlawful simply because a plaintiff alleges that the reporting, though accurate, was
 12 inconsistent with industry standards"); *Keller*, 2017 WL 130285, at *7 (same);
 13 *Connors*, 2017 WL 158493, at *4 (same).

14 Plaintiff misplaces reliance on *Cassara v. DAC Services*, 276 F.3d 1210,
 15 1217 (10th Cir. 2002), which involves employment history reporting and does not
 16 mention Metro 2 or any other credit reporting guidelines, and on *Dreher v.*
 17 *Experian Information Solutions, Inc.*, 2013 WL 2389878 (E.D. Va. May 30, 2013),
 18 which likewise does not involve the reporting of debt during a bankruptcy
 19 proceeding or any Metro 2 guidance that may be relevant here.

20 In sum, Plaintiff has failed to state a claim against Equifax for failure to
 21 perform a reasonable reinvestigation because there has been no actionable
 22 inaccuracy in the reporting of these accounts on Plaintiff's credit file, and the
 23 Complaint thus should be dismissed against it.

24 B. Equifax is Not Capable of Determining, Nor Required to Determine, the
 25 Legal Status of Plaintiff's Debts with Credit First and Barclay's under the
 26 FCRA.

27 Plaintiff argues that even though his bankruptcy proceeding has not been
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1 discharged, because the Bankruptcy Court modified his contractual obligations
 2 (“despite the Court Ordered treatment of its claim under the terms of Plaintiff’s
 3 Chapter 13 plan of reorganization” with respect to each named creditor), the
 4 reporting of any past due amounts, balances, and/or collection status during the
 5 pendency of his bankruptcy was inaccurate.

6 Whether the confirmation (not completion) of his bankruptcy plan had the
 7 legal effect of immediately and permanently overriding the contractual terms of
 8 Plaintiff’s debts with Credit First and Barclay’s is a legal dispute Equifax is unable
 9 to resolve. Nor would it be appropriate to require Equifax to try to determine the
 10 legal status of Plaintiff’s debts prior to their discharge based on the specific
 11 language of his Chapter 13 plan. “Because CRAs are ill equipped to adjudicate
 12 contract disputes, courts have been loath to allow consumers to mount collateral
 13 attacks on the legal validity of their debts in the guise of FCRA reinvestigation
 14 claims.” *Carvalho*, 629 F.3d at 891; *see also Chiang v. Verizon New England Inc.*,
 15 595 F.3d 26, 38 (1st Cir. 2010) (Defendant is “neither qualified nor obligated to
 16 resolve matters that turn on questions that can only be resolved by a court of law”);
 17 *Hupfauer v. Citibank, N.A.*, No. 16 C 475, 2016 U.S. Dist. LEXIS 112227, at *22-
 18 23 (N.D. Ill. Aug. 19, 2016); *DeAndrade v. Trans Union LLC*, 523 F.3d 61, 68
 19 (1st Cir. 2008). “With respect to the accuracy of disputed information, the CRA is
 20 a third party, lacking any direct relationship with the consumer, and its
 21 responsibility is to ‘re investigate’ a matter once already investigated in the first
 22 place.” *Carvalho*, 629 F.3d at 892 (citations omitted).

23 Equifax is not a party to the Plaintiff’s bankruptcy proceeding. Hence,
 24 Plaintiff, who is disputing the legal validity of two debts that appear on his credit
 25 report, should first attempt to resolve the matters directly with Credit First and
 26 Barclay’s, which “stand[] in a far better position to make a thorough investigation
 27 of a disputed debt than the CRA does on reinvestigation.” *Gorman v. Wolpoff &*
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1 *Abramson, LLP*, 584 F.3d 1147, 1156 (9th Cir. 2009). A CRA is not required as
 2 part of its reinvestigation duties to provide a legal opinion on the merits. The *In*
 3 *re Layo* case cited by Plaintiff, 460 F.3d 289 (2nd Cir. 2006), further illuminates
 4 Equifax's point. The Court in *In re Layo* discusses the test for *res judicata* in
 5 bankruptcy proceedings involving a plan of reorganization:

6 To determine whether the doctrine of *res judicata* bars a subsequent
 7 action [under the Bankruptcy Code], we consider whether 1) the
 8 prior decision was a final judgment on the merits, 2) *the litigants*
 9 *were the same parties*, 3) the prior court was of competent
 10 jurisdiction, and 4) the causes of action were the same.

11 *In re Layo* 460 F.3d at 292 (citations omitted). Equifax was indisputably not a
 12 party to the Plaintiff's bankruptcy. If *res judicata* attaches to the confirmation of
 13 Plaintiff's bankruptcy plan, the parties to that bankruptcy are in a superior position
 14 to know what the terms of said plan are.

15 Plaintiff argues that Equifax's reliance on *Carvalho* and *DeAndrade* "ignores
 16 the impact of a chapter 13 confirmation order and exhibit[s] a misunderstanding of
 17 the confirmation process" (Opp., p. 20), but it is Plaintiff who misunderstands the
 18 legal ramifications of confirmation (or lack thereof) in the credit reporting context,
 19 as discussed above. No court has embraced Plaintiff's view of the legal effect that
 20 a Chapter 13 confirmation order has on underlying debts.

21 As Equifax did comply with its obligations to notify Credit First and
 22 Barclay's of the Plaintiff's dispute, and was in no position to make a legal
 23 determination regarding the terms or effect of Plaintiff's confirmation order (nor
 24 was it required to do so under the FCRA), Plaintiff's Complaint should be
 25 dismissed against it.

26 **III. CONCLUSION**

27 For the foregoing reasons, Plaintiff's Complaint should be dismissed. And
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1 not only dismissed but dismissed with prejudice. Like the court found in *Carvalho*,
2 any amendment of Plaintiff's claims here would be futile because they "clearly are
3 foreclosed by the inaccuracy requirement[s]." *Carvalho*, 629 F.3d at 892; *see also*
4 *Denison v. CitiFinancial Servicing, LLC*, No. C 16-00432 WHA, 2016 WL
5 3443380, at *1 (N.D. Cal. June 23, 2016) (dismissing FCRA reinvestigation claim
6 with prejudice).

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8
9 Dated: February 6, 2017

NOKES & QUINN

10
11 /s/ Thomas P. Quinn, Jr.
12 THOMAS P. QUINN, JR.
13 Attorneys for Defendant
14 EQUIFAX, INC.
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CERTIFICATE OF SERVICE

Oliver Cristobal v. Experian Information Solutions, Inc., et al.
Case No.: 3:16-cv-06328-RS

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Orange, State of California, and not a party to the above-entitled cause.

On **February 6, 2017**, I served a true copy of:

DEFENDANT EQUIFAX, INC.'S

REPLY IN SUPPORT OF MOTION TO DISMISS

☐ By personally delivering it to the persons(s) indicated below in the manner as provided in FRCivP5(B);

☐ By depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following;

☒ By ECF: On this date, I electronically filed the following document(s) with the Clerk of the Court using the CM/ECF system, which sent electronic notification of such filing to all other parties appearing on the docket sheet;

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

I hereby certify under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Thomas P. Quinn, Jr.
THOMAS P. QUINN, JR.

Place of Mailing: Laguna Beach, California.

Executed on **February 6, 2017**, at Laguna Beach, California.

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